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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

20 CR 314 (GHW)

5 ETHAN PHELAN MELZER,

6 Defendant.

7 -----x
8 New York, N.Y.
September 9, 2020
9 10:30 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13
14 APPEARANCES (Telephonic)

15 AUDREY STRAUSS

16 Acting United States Attorney for the
Southern District of New York

17 BY: MATTHEW HELLMAN
18 SAMUEL ADELSBERG
SIDHARDHA KAMARAJU

19 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

20 BY: JENNIFER WILLIS
JONATHAN MARVINNY
21
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23
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(Via telephone)

THE COURT: Is counsel for the United States on the line?

MR. HELLMAN: Yes, good morning, this is Matthew Hellman. I will be speaking this morning for the United States, but I am also joined on the line by Assistant United States Attorneys Sidhardha Kamaraju and Samuel Adelsberg.

THE COURT: Thank you very much.

Is counsel for defendant on the line?

MR. MARVINNY: Your Honor, Jonathan Marvinny of the Federal Defenders of New York. Ms. Willis will be joining the call if she hasn't joined yet and she will be speaking for the defense.

THE COURT: Thank you. Is the defendant on the line? Mr. Melzer, are you on the line?

I'm not hearing from Mr. Melzer. We'll wait for him and Ms. Willis to join.

Mr. Melzer, is that you joining?

Mr. Melzer, have you joined the call?

Let's give it a moment.

Let me take the opportunity to ask everyone on call to keep their phones on mute at all times if you're not a participant in the call, and for the participants in the call to please keep your phones on mute at all times when you're not addressing the Court.

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1 Has Mr. Melzer joined the call?

2 MS. WILLIS: That was Jennifer Willis from the Federal
3 Defenders who joined the call.

4 THE COURT: Thank you very much. We're waiting for
5 Mr. Melzer to join the call.

6 Is Mr. Melzer on the line?

7 We'll wait for Mr. Melzer to join.

8 Let me ask whoever's digits are 452 to place your
9 phone on mute. There's background noise coming from your
10 phone. Please place your phone on mute.

11 Has Mr. Melzer joined the call?

12 We'll continue to wait. I apologize for the delay.

13 Has Mr. Melzer joined the call?

14 SPEAKER: I'm Ethan's stepfather.

15 THE COURT: Thank you. Please keep your phone on
16 mute. We're waiting for Mr. Melzer, the defendant, to join the
17 call. Everyone else should keep their phones on mute. Thank
18 you.

19 THE DEFENDANT: Ethan Melzer.

20 THE COURT: Thank you very much. Ethan Melzer just
21 joined the call.

22 Mr. Ethan Melzer, can you hear me?

23 THE DEFENDANT: Yes, Judge.

24 THE COURT: Good. Thank you very much. This is Judge
25 Woods, thank you for joining.

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1 This is the case of United States v. Ethan Melzer.
2 Good morning, Mr. Melzer, thank you for joining us.

3 I have already heard the appearances on behalf of each
4 of the parties, but just for Mr. Melzer's sake, could I ask who
5 is on the line on behalf of each of the parties? First,
6 counsel for the United States.

7 MR. HELLMAN: Yes, good morning, this is that Matthew
8 Hellman for the government, and I am also joined today by
9 Assistant United States Attorneys Sidhardha Kamaraju and Samuel
10 Adelsberg.

11 THE COURT: Thank you very much.
12 Who is on the line representing the defendant?
13 Counsel?

14 MS. WILLIS: Good morning, your Honor, Jennifer Willis
15 and Jonathan Marvinny, Federal Defenders of New York, on behalf
16 of Mr. Melzer.

17 THE COURT: Thank you very much. Let me first make a
18 few brief remarks about the protocol that I hope the parties
19 will follow during this conference just as basic organizing
20 principles. The first thing that I want to remind you all is
21 that this is a public proceeding. The dial-in information for
22 the conference is available on the Court's website. Any member
23 of the public or press is welcome to audit the conference, so
24 please keep that in mind.

25 The second thing that I would like to ask everyone on

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1 the conference to do is please keep their phones on mute. So
2 please keep your phone on mute, everyone, unless you are
3 Mr. Melzer or one of the lawyers. And for Mr. Melzer and the
4 lawyers, please keep your phones on mute except when you're
5 addressing the Court or, with my permission, your adversary.

6 Counsel and Mr. Melzer, I would like to ask you to
7 please announce your name each time that you speak during this
8 conference. That's because we're conducting this conference by
9 telephone and it's helpful for our court reporter to hear your
10 name so that the court reporter can accurately transcribe these
11 proceedings.

12 Now I'm inviting our court reporter to let us know if
13 the court reporter has any difficulty in hearing or
14 understanding anything that we say here today. If the court
15 reporter asks any of us to do something that will make it
16 easier for the court reporter to do the court reporter's job,
17 please do your best to accommodate the request. Because there
18 is a court reporter on the line who is transcribing these
19 proceedings, I'm ordering that there be no recording or
20 rebroadcast of all or any portion of the audio of this
21 proceeding.

22 So let me begin with just a few brief remarks about
23 the context in which this proceeding is taking place. As you
24 all know, we're in the midst of the Covid-19 pandemic. I'm
25 conducting this proceeding pursuant to the authority provided

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1 by Section 15002 of the CARES Act and the standing orders
2 issued by our Chief Judge pursuant to that act which permits
3 the Court to conduct remote proceedings.

4 Counsel are appearing before me by telephone. The
5 defendant is participating by telephone as well. I understand
6 that all of the lawyers and Mr. Melzer can hear me from our
7 brief colloquy earlier. What I'm going to do is to ask that
8 each of you let me know immediately if you have any difficulty
9 hearing me or an attorney or Mr. Melzer when they're speaking
10 to me.

11 Mr. Melzer, you should also please feel free to let me
12 know if at any point during this proceeding you would like to
13 speak to your lawyer. I will do all that I can within my
14 technical capacity to give you the opportunity have a breakout
15 session with them. If you would like to do so at any point
16 during this proceeding, please just let me know and I will do
17 what I can to make sure that that happens.

18 So I would like to begin with a brief colloquy
19 regarding the defendant's consent to proceed with what I expect
20 will be an arraignment on the superseding indictment and a
21 discussion of the next steps in this case.

22 So first I'm going to turn to counsel for defendant.
23 First I would appreciate a brief proffer regarding why we're
24 conducting this proceeding remotely, and I would also
25 appreciate counsel proffer regarding your communications with

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1 the defendant regarding his right to appear here, the times at
2 which those conversations happened, and regarding whether he is
3 aware of those rights, that he's willing to waive his right to
4 appear in person for his arraignment for the remainder of this
5 proceeding.

6 Let me begin with you first, counsel for the
7 defendant, why we're doing it this way, and also regarding your
8 conversations with the defendant regarding his willingness to
9 consent to proceed with his arraignment by remote means.

10 Counsel for the defendant?

11 MS. WILLIS: Yes, your Honor, this is Jennifer Willis
12 speaking.

13 As the Court has indicated, obviously we are still in
14 the midst of the Covid-19 pandemic. That has created some
15 changes in the way in which the jail operates and the protocols
16 that they utilize when taking people to and from court. So
17 primarily the reason that we are currently remote is that
18 counsel would have had some difficulties in terms of health and
19 the like getting to court. But more importantly, because
20 Mr. Melzer is currently in custody, the current operating
21 protocol that the Bureau of Prisons has been utilizing is when
22 they take someone to court for a court appearance, because that
23 involves possible contact with people who were not in that
24 facility, when they are brought back to the facility they are
25 required to be quarantined for 14, or in some cases, 21 days.

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1 That is the procedure which would have led to Mr. Melzer having
2 a lack of access to phone calls, diminished access to his
3 attorneys and diminished ability to review his discovery and
4 prepare for his case. So we had requested that this proceeding
5 be remote. One, again, it is easier for the attorneys, but
6 more importantly, so that Mr. Melzer would not have to go
7 through that quarantine which would delay and limit the ability
8 to reach out better and also communicate with counsel. So that
9 was the reason that today's proceeding is being held remotely.

10 In terms of Mr. Melzer's consent and willingness to
11 proceed in this fashion, we have had ongoing conversations with
12 him via a video visioning system that the jail has put in place
13 during this pandemic. We have been able to meet with him in
14 that capacity. We have been able to have confidential legal
15 calls with him. And as recently as this morning, prior to
16 today's court appearance, I was able to speak to him
17 confidentially again.

18 In all of those conversations we have, of course,
19 discussed with him the fact that he has an absolute right, if
20 he wants, to be able to appear physically in the courthouse
21 before your Honor with his lawyers next to him, and he has
22 agreed and is waiving his right to appear physically in court
23 and he's willing to proceed today via teleconference for all of
24 the reasons that I just laid out for the Court.

25 THE COURT: Good. Thank you. And counsel, were you

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1 able to discuss with the defendant a potential written waiver
2 of Mr. Melzer's right to be physically present for his
3 arraignment today? If not, why not?

4 MS. WILLIS: Your Honor, I am sorry, that's an
5 oversight on my part. We certainly have reviewed that waiver
6 in its entirety with him in the past because all of his
7 proceedings thus far have been remote in one capacity or the
8 other, either video or audio. In preparing for today's
9 arraignment and conference, while I did discuss with him yet
10 again the fact that he has a right to be present and whether he
11 would agree to proceed remotely, I did not think -- quite
12 frankly, I'm sorry, your Honor -- to pull up that particular
13 document and go through it with him again, but he has certainly
14 had it read to him in the past and has authorized us or a judge
15 to sign that in the past on his behalf.

16 THE COURT: Good. Thank you. Let me say a few brief
17 words. At the outset, let me note that there is limited video
18 conferencing capacity available at the facility where
19 Mr. Melzer is currently incarcerated. I requested video
20 conference for this conference but none was available. As a
21 result, I find that video conferencing was not reasonably
22 available for purposes of conducting this proceeding. The
23 defendant is able to participate in this proceeding by
24 telephone. He is able to hear and understand me and the others
25 engaged in this conference.

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1 Now while I have not received a written waiver of the
2 defendant's presence at this proceeding, on the basis of the
3 proffer by counsel, pursuant to Rule 10(b) of the Federal Rules
4 of Criminal Procedure, I find a knowing and voluntary waiver of
5 the defendant's right to be present for the arraignment. I
6 find, moreover, that the defendant has knowingly and
7 voluntarily consented to proceed to this conference by remote
8 means. It was possible for defendant to have signed a written
9 waiver, but I understand that it was an omission by counsel and
10 I'm able to conclude that we can proceed in the absence of such
11 a waiver on the basis of the proffer. I should also say that I
12 reviewed the transcript of the prior proceedings before Judge
13 Netburn in which she discussed with Mr. Melzer a written
14 consent form in which he authorized her to sign the document.
15 So I'm aware that he's familiar with the form itself in
16 addition to the representations by counsel for the defendant
17 here.

18 So let me turn now to the substance of this
19 conference.

20 Mr. Melzer, at this point you've been named in an
21 eight-count indictment, which is numbered S1 20 CR 314. The
22 case has been assigned to me. The purpose of this proceeding
23 is to do a number of things: First, I want to make sure that
24 you have a copy of the superseding indictment. I want to
25 inform you of the charges against you in the superseding

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1 indictment. I would like to take your plea with respect to
2 each of the charges in the superseding indictment, then I
3 expect that we'll dedicate the remainder of this conference to
4 a discussion of what will happen next in this case.

5 So at the outset, I know that you've already had an
6 initial appearance before the magistrate judge who informed you
7 of a number of your rights. Because of the importance of your
8 right to remain silent, I want to review that right for you
9 here now. Mr. Melzer, you have the right to remain silent.
10 You do not have to say anything to anyone. If you give up that
11 right and make a statement, the prosecutor can use everything
12 that you say against you. Therefore, I strongly suggest that
13 you not say anything to anyone unless you and your counsel
14 decide that it is in your best interest to do so. If you have
15 already given a statement, you don't have to say anything else.
16 If you decide to go ahead and make a statement, you have the
17 right to stop at any time.

18 Mr. Melzer, do you understand your right to remain
19 silent?

20 THE DEFENDANT: Yes, Judge.

21 THE COURT: Thank you. And you understand that you're
22 being represented in these proceedings by counsel from the
23 Federal Defender's Office, is that correct, and do you wish
24 them to continue to represent you here?

25 THE DEFENDANT: Yes, Judge.

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1 THE COURT: Thank you. Now Mr. Melzer, I'm going to
2 just ask to make sure, Mr. Melzer, if at any point you have any
3 difficulty understanding what is happening here today, I invite
4 you to let me know. I'm happy to explain anything further, or,
5 as I say, I would be happy to give you the opportunity to
6 confer further with your counsel.

7 Let me turn first to you, Mr. Melzer, just to ask if
8 you have seen a copy of the superseding indictment which is the
9 indictment that's numbered S1 20 CR 314. Have you seen that,
10 Mr. Melzer?

11 THE DEFENDANT: No, Judge, I haven't been able to get
12 a copy of it yet.

13 THE COURT: Let me turn to counsel for the defendant.
14 Counsel, have you had the opportunity to review the indictment
15 and to discuss it with Mr. Melzer?

16 MS. WILLIS: Yes, we have, your Honor. I think that
17 he was trying to be completely accurate. He has not physically
18 seen a copy of the superseding indictment, but it has been read
19 to him in its entirety and we certainly have discussed it with
20 him as well.

21 THE COURT: Thank you. So Mr. Melzer, have you heard
22 the entirety of the superseding indictment?

23 THE DEFENDANT: Yes, Judge.

24 THE COURT: Thank you. Let me turn to counsel for the
25 United States. Counsel, could I ask you to please summarize

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1 the charges on which the defendant is being arraigned today.

2 MR. HELLMAN: This is Matthew Hellman for the United
3 States. I will do so.

4 The superseding indictment contains the original six
5 charges on which the defendant was first arraigned on July 6,
6 2020. Those charges are:

7 One, conspiracy to murder U.S. nationals abroad, and
8 two, attempted murder of U.S. nationals abroad, both in
9 violation of Title 18, United States Code, Section 2332(b);
10 third and fourth, conspiracy to murder U.S. service members and
11 attempted murder of U.S. service members in violation of Title
12 18, United States Code, Section 1117 and 1114 respectively;
13 fifth, provision and attempted provision of material support
14 for terrorist acts in violation of Title 18, United States
15 Code, Section 2339A; and sixth, conspiracy to murder and maim
16 abroad in violation of Title 18, United States Code, Section
17 956(a).

18 Those are the same, again, six charges as in the
19 original indictment. The superseding indictment, which was
20 filed on August 18, 2020, adds two counts: Count Seven,
21 illegal transmission of national defense information in
22 violation of Title 18, United States Code, Section 793(d); and
23 Count Eight, transmission and attempted transmission of
24 national defense information to a faction or citizen of a
25 foreign country in violation of Title 18, United States Code,

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1 Section 794(a).

2 Your Honor, all eight charges relate to the
3 defendant's activities in or about April and May 2020. While
4 deployed overseas as a member of the United States Army, the
5 173rd Airborne Division, the defendant was also a member of a
6 white supremacist group which promoted and sought to incite
7 extreme violence, including rape, murder and acts of terrorism,
8 as means by which to accomplish the group's goals of destroying
9 plural society, initiating race and gender-based global
10 conflict, causing the collapse of democracies, including the
11 United States government, and accelerating the demise of
12 Western Civilization in an effort to create a world in which
13 specific groups of white men maintain exclusive power.

14 From at least April 2020, the defendant participated
15 in encrypted chat rooms and conspired with other members of
16 this group to attempt to cause the ambush murders of the
17 defendant's own military unit while deployed overseas, an
18 ambush to be conducted by foreign extremist or terrorist
19 fighters, including potential members of ISIS or al Qaeda. As
20 part of this effort, the defendant passed classified
21 information during these chats to his co-conspirators regarding
22 defensive military installation and the United States military
23 and civilian personnel working there that his unit was
24 deploying to protect. This conduct forms the basis for the
25 eight counts in the indictment.

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1 THE COURT: Thank you, counsel.

2 Let me turn to you, Mr. Melzer. Mr. Melzer, you have
3 the right for me to read the superseding indictment to you out
4 loud here on the record. I would be happy to do that. You
5 also can waive that right.

6 Mr. Melzer, would you like me to read the indictment
7 to you on the record here today?

8 THE DEFENDANT: No, thank you, Judge.

9 THE COURT: Thank you. Counsel for defendant, does
10 the defendant waive formal reading of the indictment?

11 MS. WILLIS: This is Jennifer Willis. Yes, he does,
12 your Honor.

13 THE COURT: Thank you very much.

14 So Mr. Melzer, I would like to ask, first, if you
15 understand what you've been charged with. Do you, Mr. Melzer?

16 THE DEFENDANT: Yes, Judge.

17 THE COURT: Thank you very much. So Mr. Melzer, I'm
18 now going to walk through each of the counts of the superseding
19 indictment and ask for your plea with respect to each of the
20 counts.

21 Count One, Mr. Melzer, charges you with conspiracy to
22 murder United States nationals in violation of 18, United
23 States Code, Sections 2332(b) and 3238. How do you plead to
24 this count?

25 THE DEFENDANT: Not guilty, Judge.

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1 THE COURT: Thank you. Count Two charges you with the
2 attempted murder of United States nationals in violation of
3 Title 18, United States Code, Sections 2332(b), 3238 and 2.
4 How do you plead to this count?

5 THE DEFENDANT: Not guilty, Judge.

6 THE COURT: Thank you. Count Three charges you with
7 conspiracy to murder United States service members in violation
8 of 18, United States Code, Sections 1114, 1117, and 3238. How
9 do you plead to this count?

10 THE DEFENDANT: Not guilty, Judge.

11 THE COURT: Count Four charges you with the attempted
12 murder of United States service members in violation of Title
13 18, United States Code, Sections 1114, 3238, and 2. How do you
14 plead to this count?

15 THE DEFENDANT: Not guilty, Judge.

16 THE COURT: Thank you. Count Five charges you with
17 provision and attempted provision of material support to
18 terrorists in violation of Title 18, United States Code,
19 Sections 2339A(a), 3238, and 2. How do you plead to this
20 count?

21 THE DEFENDANT: Not guilty, Judge.

22 THE COURT: Thank you. Count Six charges you with
23 conspiracy to murder and maim in a foreign country in violation
24 of Title 18, United States Code, Sections 956(a)(1),
25 956(a)(2)(A) and 3238. How do you plead to this count?

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1 THE DEFENDANT: Not guilty, Judge.

2 THE COURT: Thank you. Count Seven charges you with
3 illegal transmission of national defense information in
4 violation of Title 18, United States Code, Sections 793(d), and
5 2. How do you plead to this count?

6 THE DEFENDANT: Not guilty, Judge.

7 THE COURT: Thank you. Count Eight charges you with
8 illegal delivery of national defense information in violation
9 of Title 18, United States Code, Sections 794(a), and 2. How
10 do you plead to this count?

11 THE DEFENDANT: Not guilty, Judge.

12 THE COURT: Thank you, Mr. Melzer, your pleas of not
13 guilty are accepted.

14 So let me turn back to counsel for the United States.
15 I heard a brief summary of the case from your description of
16 the acts that drove the charges here. Is there anything else
17 that you would like to share with the Court regarding the
18 nature of the case?

19 MR. HELLMAN: This is Matthew Hellman for the United
20 States. Nothing in particular at this time, your Honor, but I
21 do think that relevant to today's conference and this
22 conversation we will turn to one of the aspects of the
23 government's case as relating to the charges that classified
24 information was passed by the defendant and what the government
25 anticipates discovery and further practice with respect to that

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1 classified information will entail. And when the Court is
2 ready, the government can also turn to its provision of
3 discovery to date and how it anticipates to continue providing
4 discovery going forward.

5 THE COURT: Good. Thank you. Those are both germane.
6 Let me turn to the defendant for just a moment. Before we do,
7 counsel for the United States, at this point do you anticipate
8 filing any further superseding indictments adding defendants or
9 additional charges?

10 MR. HELLMAN: Matthew Hellman for the United States.
11 Not at this point, your Honor.

12 THE COURT: Thank you. So Mr. Melzer, as your counsel
13 has likely told you, you have the right to some of the evidence
14 that's collected by the government. I expect to now turn to a
15 discussion with the United States regarding what the evidence
16 looks like and when they expect to turn it over to you. Then I
17 expect I will talk about how much time your counsel will need
18 in order to review it and to discuss it with you, Mr. Melzer.

19 So counsel for the United States, let me turn to the
20 topics that you identified. What can you tell me about the
21 status of discovery at this point?

22 MR. HELLMAN: Matthew Hellman for the United States.
23 Your Honor, the government has made two discovery productions
24 to date, those being on July 22nd and August 21st, 2020
25 respectively.

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1 The discovery to date I think can be fairly
2 characterized as significant and voluminous. The discovery
3 includes, among other things, the following primary categories
4 of information, documents and materials: First, chat records
5 from the chat or communications application called Telegram
6 pertaining to the group that I described earlier and direct
7 messages with members of the group in which the defendants
8 participated.

9 Next, the defendant's Army records: Those include
10 records pertaining to the United States Army and Department of
11 Defense investigation of the defendant's conduct, records
12 relevant to the defendant's initial custody with the Army when
13 he was initially taken into custody by U.S. military personnel
14 in Italy on May 30, 2020. There are reports from the Army
15 investigators involved in that investigation and records of the
16 initial military proceedings which took place. There are also
17 personnel documents, information on training in connection with
18 his service in the Airborne division, briefings that the
19 defendant attended regarding his unit's upcoming deployment,
20 the defendant's classified clearance information clearance
21 records, that is, his information pertaining to his background
22 check and records pertaining to his receiving security
23 clearance, and the non-disclosure agreements related to
24 classified information that were signed by the defendant.

25 The government has also provided arrest records from

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1 the defendant's transfer to FBI custody, photos and records
2 related to physical searches of the defendant's Army housing
3 space, his quarters and belongings, records pertaining to three
4 interviews in which the defendant participated after being
5 initially taken into custody, including audio and video
6 recordings of two of those interviews, and draft transcripts of
7 those recorded interviews.

8 The government has provided information obtained
9 pursuant to legal process, including subpoenas and law
10 enforcement requests for information, forensic extractions of
11 the defendant's two cellphones, as well as a PlayStation video
12 game console. Those searches were conducted pursuant to search
13 warrant. The search warrant and supporting materials have been
14 disclosed to the defendant as well.

15 The government executed numerous search warrants which
16 were obtained pursuant to the Stored Communications Act, and
17 any corresponding information received pursuant to those
18 warrants have also been provided to the defendant. Those
19 include various facilities, such as email, social media
20 accounts, video game services and other electronic
21 communication services, approximately 17 in total.

22 The government has also provided reports of interviews
23 conducted by law enforcement with over 20 witnesses, and also
24 has provided records, background information and source
25 documents related to, among other things, the Order of Nine

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1 Angles and the RapeWaffen Division, which collectively were the
2 white supremacy groups in which the defendant claimed
3 membership.

4 So the government believes that at this point with
5 those records, discovery is very close to being complete. The
6 government is preparing a third discovery production which it
7 anticipates will be provided to the defendant and counsel for
8 the defendant within about a week's time, certainly by the end
9 of next week, which will not be as voluminous as the prior
10 productions but includes records pertaining to, among other
11 things, co-conspirators involved with the defendant's conduct.

12 Of course the government will continue, as it receives
13 information pursuant to investigation that falls into any
14 Rule 16 category, produce those materials to the defendant, but
15 setting aside for the moment the classified information, which
16 I will turn momentarily, there are no other truly significant
17 buckets, as it were, of discovery that remain to be served on
18 the defendant that are in the government's possession at this
19 time.

20 THE COURT: Sorry, counsel, before you turn to
21 classified information, you say "truly significant buckets." I
22 just want to be as precise as possible here. After the
23 production that is anticipated by the end of next week, what
24 additional discovery do you anticipate the government will need
25 to turn over to the defendant that is currently in your

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1 possession or control? I would like to see that there's a
2 clear schedule for the completion of production of what the
3 government has now.

4 MR. HELLMAN: Matthew Hellman for the United States.
5 Thank you, your Honor.

6 So very little is the answer, but based on the nature
7 of the investigation, it is our experience that there may be
8 additional reports, additional witness interviews that could
9 take place, other investigation files that government will
10 review to determine if any other Rule 16 information exists,
11 including, for example, investigations conducted by the
12 government with respect to the groups to which the defendant
13 adhered or co-conspirators who may have been involved in the
14 defendant's conduct or in other conduct with these groups.

15 So the government is not currently aware of any
16 significant tranches of discovery relating to any of those
17 categories, and we in fact have already turned over significant
18 files pertaining to those other ancillary investigations. Of
19 course the government will continue to review those files and
20 can't certify at this time that no other discovery exists, but
21 when I say "significant," what I mean is I don't anticipate any
22 further, for example, multigigabyte productions of electronic
23 information. The government has already provided the
24 defendant's statements, search warrants underlying the searches
25 conducted by the government, and in significant part, both FBI

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1 and Army investigative files, which, along with the electronic
2 chat records, form the backbone of discovery in this case.

3 THE COURT: Thank you. I understand the government
4 expects to continue its review of the ancillary materials that
5 you're describing. Do you have a sense by when the government
6 will have completed its review of existing records to see if
7 there are Rule 16 materials that must be disclosed to the
8 defendant?

9 MR. HELLMAN: Matthew Hellman for the United States.
10 The government is continuing its review and does not anticipate
11 that that review will take longer than this month, September,
12 but we'll continue to review these files with diligence going
13 forward.

14 THE COURT: Thank you. So my expectation then is that
15 the third tranche of discovery will be provided by next Friday
16 and that the government is committed to conduct a review of
17 what they've described as the ancillary materials within a
18 month from today in order to ascertain whether there's other
19 discoverable materials there. And I expect that there will be
20 a rolling production of such information as and when it's
21 discovered after appropriate review by the United States.

22 So counsel for the United States, let's turn to a
23 discussion of how the parties should best handle any classified
24 material that's involved in the case. Counsel for the United
25 States?

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1 MR. HELLMAN: Matthew Hellman for the United States.
2 Thank you, your Honor. I should mention one detail about
3 discovery that has been served so far, which is that the
4 government has confirmed that counsel has received the two
5 productions that I described. The government has also sent
6 those materials to the MCC for the defendant's review. There
7 was a delay in the defendant's receiving the first production
8 which the MCC had received, but as of this morning, legal
9 counsel at MCC New York confirmed that as of yesterday that
10 hard drive was available for the defendant.

11 The government's second production of discovery, which
12 was more recent, has also been received by the MCC, according
13 to the government's records, but should be made available for
14 the defendant's review by the end of next week. Counsel for
15 the defendant had alerted the government to this delay and it
16 does seem that it is now being rectified, but there appears to
17 be a lag period between when the government sends that
18 discovery and when the defendant is able to review it. We'll
19 continue to work with counsel to monitor that situation and
20 hope there are no delays going forward but will be mindful of
21 that as we proceed.

22 THE COURT: Good. Thank you, counsel.

23 MR. HELLMAN: As far as classified discovery is
24 concerned, we have spoken with counsel for the defendant.
25 Mr. Marvinny needs to update his clearance, but that process

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1 has begun and should be completed within a month. And at that
2 point, the process of providing discovery to counsel should be
3 relatively seamless.

4 There is a modest discovery production of classified
5 material, and when I say that, I mean it consists of documents
6 which should not exceed approximately 100 pages worth of PDF
7 files. That is prepared, and we have advised defense counsel
8 that it is ready when they are ready to accept it. It can be
9 served and stored in a SCIF or we can, as counsel requested,
10 wait to serve it until Mr. Marvinny's clearance is completed.
11 That is the extent of discovery as far as classified discovery
12 is concerned at this point. And the parties have also agreed
13 to a protective order pursuant to the Classified Information
14 Procedures Act, which I believe has been submitted for the
15 Court's review.

16 THE COURT: Good. Thank you very much. That is the
17 next question. Counsel, I don't have the CIPA order in front
18 of me. If it was sent to my chambers' email account, I don't
19 think I have it, and I don't see it filed on the docket. Let's
20 follow up on that after the conference.

21 So counsel for defendant, let me turn to you. I
22 understand there's a substantial volume of discovery to review
23 and that the discovery production won't be substantially
24 complete until the end of next week. Counsel for defendant,
25 with that information in hand, what's your proposal regarding

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1 appropriate next steps in this case?

2 MS. WILLIS: Your Honor, this is Jennifer Willis from
3 the Federal Defenders speaking. We would be requesting a
4 90-day wait, and the reason for the atypical length of time has
5 to do with the volume of discovery. As the government said,
6 their initial production was quite voluminous. But it also has
7 to do with Mr. Melzer's ability to review discovery himself and
8 our ability to consult with and discuss that with him.

9 As the government indicated, they had sent a copy of
10 the first production to Mr. Melzer around the same time that
11 they produced materials for counsel, and I believe that was in
12 July, and I was able to confirm with Mr. Melzer this morning
13 that he did in fact receive that first production last night at
14 the Bureau of Prisons. So that was well over a month, month
15 and a half lag time there between it being sent, arriving at
16 the Bureau of Prisons, and then being actually provided to him
17 for his review.

18 Because the productions include video and electronic
19 material, that is material that he will need to be able to
20 review by a computer. They're in limited access currently
21 within the Bureau of Prisons again because of restrictions put
22 in place connected with Covid and safety protocols being
23 utilized. So he will have to go to the law library and the
24 like in order to access a secure computer so that he can review
25 that discovery, and that will take some time as well.

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1 So I am asking for 90 days so Mr. Melzer has time to
2 review -- he only received the first production. Obviously the
3 second and third hopefully will arrive at the Bureau of Prisons
4 without the delay that we saw with the first productions -- and
5 also for counsel to be able to review the two productions that
6 we already have, the third production which is forthcoming, for
7 Mr. Marvinny to complete the renewal of his security clearance
8 and then to review the classified information as well. And so
9 that is why I'm making that request for a 90-day adjournment,
10 your Honor.

11 THE COURT: Thank you very much. So counsel for
12 United States, let me turn to you. You've heard the request by
13 the defense, what's your position regarding that request?

14 MR. HELLMAN: Matthew Hellman for the United States.
15 The government understands the basis of the request and we do
16 not have an objection given what the government thinks the
17 defense fairly characterized as substantial discovery. Given
18 the limitations imposed also by the ongoing Covid-19 pandemic
19 and the need to review that discovery with the defendant, 90
20 days is not inappropriate in this case from the government's
21 perspective.

22 THE COURT: Good. Thank you very much. So I will
23 grant the defendant's request and set a conference for about 90
24 days from today.

25 Counsel, I'm going to propose that we do this on

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1 December 9, which is just three months from now. I could also
2 offer December 16. I'm not sure exactly what time it will be
3 at yet. Assuming that the defense will again request that the
4 hearing be conducted by remote means, counsel for the
5 defendant, is that your request?

6 MS. WILLIS: Yes, it is, your Honor, and either one of
7 the dates that the Court proposed will work for counsel.

8 THE COURT: Good. Thank you. Let's schedule it for
9 December 9. Counsel for the United States, are you available
10 on that date?

11 MR. HELLMAN: Matthew Hellman for the United States.
12 The government will be available, thank you.

13 THE COURT: Good. Thank you. So initially I will
14 schedule this for 9:00 a.m. on December 9. The time may change
15 depending on the slots that are available for us to conduct
16 that proceeding. At defendant's request, I will schedule it to
17 be conducted by remote means. I encourage defendant to obtain
18 a written waiver in advance of the conference, if possible.

19 Is there anything else that we need to talk about here
20 apart from the speedy trial clock? Counsel for the United
21 States, anything on behalf of the government?

22 MR. HELLMAN: Matthew Hellman for the United States.
23 I would like to clarify something that I said earlier with
24 respect to the CIPA protective order. The parties are still
25 discussing that order and I think that it will be submitted

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1 after Mr. Marvinny is recertified as cleared, but it has not
2 yet been submitted to the Court for consideration. So it was
3 not missed by your Honor, that was a misstatement on my part.

4 Additionally, with respect to any anticipated
5 litigation pursuant to the Classified Information Procedures
6 Act, the government anticipates that no later than the end of
7 this week it will submit a brief letter outlining its
8 perspective on the potential litigation pursuant to CIPA and
9 outlining next steps. That letter will be filed on the docket.

10 THE COURT: Good. Thank you very much, counsel.

11 Counsel for the defendant, anything else before we
12 come to the speedy trial clock?

13 MS. WILLIS: No, your Honor, thank you.

14 THE COURT: Good. Thank you. Counsel for the United
15 States, is there an application?

16 MR. HELLMAN: Yes, your Honor, Matthew Hellman for the
17 United States. The government moves at this time to exclude
18 time under the Speedy Trial Act between today and December 9,
19 2020. The ends of justice will be served by this exclusion to
20 allow the review by counsel of extensive discovery which has
21 been provided in this case, for counsel to consider any
22 appropriate pretrial motions, and for the parties to discuss
23 any potential pretrial issues or potential for resolution of
24 this case during that intervening period.

25 THE COURT: Thank you. Counsel for defendant, do you

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1 consent to the exclusion of time?

2 MS. WILLIS: This is Jennifer Willis for the Federal
3 Defenders. Yes, we consent, your Honor.

4 THE COURT: Thank you. I will exclude time from today
5 until December 9, 2020. After balancing the factors that are
6 specified in 18, United States Code, Section 3161(h)(7), I find
7 that the ends of justice served by excluding such time outweigh
8 the best interests of the public and the defendant in a speedy
9 trial because it will allow time for the production of the
10 voluminous discovery described by the United States here and
11 for review of those materials by the defendant and his counsel.
12 It will also allow time for the defendant to consider any
13 potential motions and also time for the parties to potentially
14 discuss a pretrial disposition of this case.

15 So thank you very much. Is there anything else that
16 we need to take up here, counsel, before we adjourn? First,
17 counsel for the United States.

18 MR. HELLMAN: Matthew Hellman for the United States.
19 Nothing further, your Honor, thank you.

20 THE COURT: Thank you. Counsel for defendant?

21 MS. WILLIS: Jennifer Willis, Federal Defenders.
22 Nothing further, your Honor, thank you.

23 THE COURT: Good. Thank you all. This proceeding is
24 adjourned.

25 (Adjourned)